Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October Term, 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment protection of freedom of association narrow the circumstances in which state tort and 42 U.S.C. §1985(3) derivative liability can be imposed against a non-profit advocacy organization to those where the organization authorized, had knowledge of or ratified the unlawful act upon which liability is based?

2. Does 42 U.S.C. §1985(3), like 42 U.S.C. §1983, require the personal and direct involvement of the defendant so as to preclude the imposition of vicarious liability?

3. Can a 42 U.S.C. §1985(3) claim be based on an alleged animus against religion?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The Cult Awareness Network respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Western District of Washington and the dissent thereto is reported at *Scott v. Ross,* 140 F.3d 1275 (9th Cir. 1998) and attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc and the dissent thereto is reported at *Scott v. Ross,* 151 F.3d 1247 (9th Cir. 1998) and attached hereto as Appendix B.

The judgment on decision by the United States District Court for the Western District of Washington is unreported and attached hereto as Appendix C.

The Order denying Cult Awareness Network's motion for judgment as a matter of law, a new trial, or new trial conditioned on remitter by the United States District Court for the Western District of Washington is unreported and attached hereto as Appendix D.

BASIS FOR JURISDICTION

Petitioners seek a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Western District of Washington that was filed on April 8, 1998.

A timely petition for rehearing and suggestion for rehearing en banc was filed on April 23, 1998.

The Order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed on August 26, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution First Amendment

42 U.S.C. §1985(3)

The text is set forth in Appendix E.

STATEMENT OF THE CASE

1. Introduction

Petitioner, the Cult Awareness Network ("CAN"), is a non-profit advocacy organization that seeks to educate the public about the harmful effects of mind control as used by destructive cults. CAN pursues this mission by offering information and counseling to persons concerned with destructive cults and by seeking to understand the tactics of mind control in order to provide protection from those persons who take advantage of people through mind control and coercive persuasion. CAN has been granted tax-exempt status under 26 U.S.C. §501(c)(3) by the Internal Revenue Service.

CAN's mission has proved controversial with those organizations that CAN believes utilize the types of mind control and coercive persuasion that CAN opposes. These include both religious and non-religious organizations. Some of these organizations have pursued steps to silence CAN's message.[1] Whether one agrees or disagrees with

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[1] One of the most vocal of CAN's opponents has been the Church of Scientology International ("CSI"). CSI has engaged in a campaign including filing lawsuits and taking other measures to harass CAN, silence CAN's criticisms of CSI, and ultimately to destroy CAN and silence its message. CSI's allegedly unlawful campaign is the subject of ongoing litigation between CAN and CSI. *See CAN v. CSI, et. al.*, 685 N.E.2d 1347 (Ill. 1997). The trial attorney for Jason Scott, Kendrick Moxon, regularly represents CSI and related scientology interests. The appellate attorney for Jason Scott, Eric Lieberman, also regularly represents CSI. Mr. Scott has filed an affidavit in the case indicating that Mr. Moxon solicited him as a client and did not apprise him of Mr.

CAN's message, that message is one which the members of CAN have First Amendment associational and speech rights to advocate. The judgment in the *Scott* case at issue, in the words of the Honorable Judge Kozinski joined by six other Circuit Judges dissenting from the order rejecting the suggestion for rehearing en banc, has "put the Cult Awareness Network out of business and silenced its message." *Scott v. Ross*, 151 F.3d 1247, 1248 (9th Cir. 1998).

The judgment against CAN stems from a jury finding that CAN was vicariously liable for the negligence of an alleged agent of CAN in connection with the illegal deprogramming of Respondent, Mr. Scott. The jury further found that CAN was also vicariously liable for acts of its alleged agent in conspiring with the other defendants with an anti-religious animus to deprive Mr. Scott of his right to travel in violation of 42 U.S.C. §1985(3). On the Section 1985 claim, the jury awarded punitive damages against CAN.

Moxon's plans with CSI to destroy CAN. Mr. Scott subsequently sold his judgment against CAN to Gerald Beeny for $25,000. Mr. Beeny has continued to use the services of Mr. Moxon and Mr. Lieberman. Mr. Beeny has also taken steps to try to execute the Scott judgment against two assets held by CAN: CAN's internal records and CAN's causes of action against CSI including the *CAN v. CSI* litigation. *See also*, Hansen, Did Scientology Strike Back?, The American Lawyer, June 1997 (cited by Judge Kozinski in his dissent to order rejecting suggestion for rehearing en banc).

2. Course of Proceedings

This case arises out of a mother's efforts to help her children who had become involved with a church that the mother felt was destructive and was alienating her children from her. The mother, Kathy Tonkin, contacted Shirley Landa through a referral from the Seattle Community Service, a multi-service hotline. Ms. Landa in turn referred Ms. Tonkin to defendant Rick Ross to perform a deprogramming of Ms. Tonkin's two youngest sons. Defendants Ross, Charles Simpson, and Mark Workman, conducted a legal and successful effort with respect to Ms. Tonkin's two youngest sons. Ms. Tonkin then retained Ross to deprogram her eldest son, Mr. Scott, who had turned 18. Ross, Simpson, and Workman conducted a deprogramming of Mr. Scott. Ms. Tonkin and one of Mr. Scott's brothers was present. Unfortunately, Mr. Scott's deprogramming was conducted illegally and included the abduction and involuntary restraint of Mr. Scott at a house in Ocean Shores, Washington for five days. Mr. Scott escaped and subsequently brought this lawsuit alleging negligence and a conspiracy to deprive him of his civil rights. CAN was named as a defendant on the basis that Ms. Landa was allegedly acting as an agent for CAN at the time she referred Ross to Ms. Tonkin. Ms. Landa was not named as a defendant.

Mr. Scott filed his Complaint on January 14, 1994. After a six day trial, the jury rendered a verdict finding defendants Ross, Simpson, Workman, and CAN liable for negligence in the following percentages: Ross, 70%, Workman 10%, Simpson 10%, and CAN 10%. The jury further found that each of the defendants, including CAN, had been involved in a conspiracy to deprive Mr. Scott of his civil rights. The jury found Mr. Scott's total amount of damages to be $875,000. Finally, the jury awarded punitive damages on the conspiracy claim against Ross in the amount of $2,500,000, against Workman in the amount of $250,000, against Simpson in the amount of $250,000, and against CAN in the amount of $1,000,000.

CAN timely filed an appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the lower court judgment 2 to 1. *Scott v. Ross*, 140 F.3d 1257 (9th Cir. 1998). The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation, dissented specifically emphasizing the complete lack of evidence establishing any knowledge or ratification by CAN of the underlying lawful acts alleged by Mr. Scott. The majority determined liability could be imposed upon CAN based only on evidence suggesting the alleged agent was following CAN's policy supporting involuntary, but lawful deprogramming.

CAN timely filed a motion for rehearing and suggestion for rehearing en banc. By order filed August 26, 1998, the Ninth Circuit panel denied the motion for rehearing. The suggestion for rehearing en banc was referred to the full court, but failed to gather the majority vote necessary for en banc consideration. *Scott v. Ross*, 151 F.3d 1247 (9th Cir. 1998). The Honorable Judge Kozinski, joined by Judges Pregerson, Reinhardt, Kleinfield, Hawkins, Tashima and McKeown, filed a dissent from the order rejecting the suggestion for rehearing en banc. The dissent principally focused on the failure of the panel to adequately consider the First Amendment implications of the imposition of vicarious liability and the conflict between the panel's decision and guiding Supreme Court precedent. Judge Kozinski wrote: "More importantly, the panel ignores the threat that vicarious tort liability poses to the freedom of CAN's members to associate with one another. In direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association." 151 F.3d at 1248.

3. Statement of the Case

In an unprecedented and unsupportable finding, CAN, a controversial, advocacy, non-profit organization was held responsible for the act of one of its unpaid volunteers. The act -- a referral to a deprogrammer who performed an illegal

deprogramming -- was one of which CAN had no knowledge, which was contrary to CAN policy, and which was not undertaken even under the apparent authority or involvement of CAN.

CAN is "a national non-profit organization founded to educate the public about the harmful effects of mind control as used by destructive cults." CAN's paid staff consists of a full-time Executive Director and three part-time staff, all located at its Illinois headquarters.

CAN operates nationally through its Board of Directors ("Board") which sets policy for the organization. There is absolutely no evidence that any CAN board member had foreknowledge of any aspect of the planning or implementation of the deprogramming of Mr. Scott. Nor is there any evidence that the CAN Board in any way authorized or ratified the actions of Mr. Ross or any of the other defendants in Mr. Scott's abduction and deprogramming.

For a long time, CAN has had a specific Board policy against illegal deprogrammings. This unequivocal policy dates back well before the incidents at issue to the time of CAN's predecessor organization, the Citizens Freedom Foundation. In a publication entitled "The History of the Citizens Freedom Foundation," CAN's predecessor wrote: "We do not engage in or support abduction or holding a person against his will." In fact, CAN has

terminated employees for their involvement in illegal deprogrammings. On the other hand, CAN does support legal, voluntary deprogrammings. But in so doing, CAN has been very careful to make clear the distinction between legal and illegal acts. For example, in CAN at a Glance, CAN states: "CAN recognizes the need for **voluntary** exit counseling/deprogramming as a means to restore critical thinking, and supports all **legal** efforts to protect individuals' freedom of choice." (emphasis added). Accordingly, the type of deprogramming used with Mr. Scott was not authorized or in accordance in any way with CAN policy.

CAN's executive director, Cynthia Kisser, runs the CAN national office. There was no evidence that Ms. Kisser was in any way involved in the referral of Mr. Ross to Kathy Tonkin. There was no evidence that Ms. Kisser was consulted about the referral or Mr. Scott's deprogramming. There was no evidence that Ms. Kisser had any foreknowledge of the deprogramming of Mr. Scott. There was no evidence that Ms. Kisser ratified or approved after the fact the deprogramming of Mr. Scott.

CAN also operates through the use of "contact" persons. A "contact" is an unpaid part-time volunteer who is available in given areas to speak to members of the public on behalf of CAN. Contact persons generally have been chosen because of their commitment to CAN and CAN's

tenets. CAN contact persons are required to adhere to CAN policies -- including the policy against support of, or referral to, illegal deprogrammings. It would be irresponsible for a CAN contact person to make a referral to a person performing illegal deprogrammings. There was no evidence that CAN required its contact people to limit their activities to CAN or otherwise prohibited its contacts from being active in other, even like-minded, organizations. Mr. Scott's case against CAN relies entirely on the link between CAN and its contact person in Washington.

Shirley Landa is CAN's contact person in the state of Washington. However, CAN was but one of several organizations in which Ms. Landa was actively involved. In 1991, the year in which the events relevant to this case occurred, Ms. Landa was active in two organizations interested in cults in addition to CAN.

Prior to the referral of Mr. Ross, Ms. Landa had referred individuals to deprogrammers. Ms. Landa, however, had never received any report that any of these prior referrals had resulted in the illegal abduction of any person. There was no evidence that anyone at CAN had any different knowledge or understanding about prior referrals Ms. Landa had made. In other words, at the time of the events at issue, CAN believed that Ms. Landa acted wholly in accordance with CAN policy regarding referrals.

In 1991, Ms. Landa was volunteering for an organization called Parent Awareness. People who called the Seattle Community Services crisis hotline about family members involved in potentially extreme or destructive groups were referred to Parent Awareness. There was no evidence that Parent Awareness was related to CAN. There was no evidence that the Crisis Hotline referenced in any way Ms. Landa's association with CAN when referring people to her.

Mr. Scott's mother, Ms. Tonkin sought help in dealing with her sons. They were involved in the Life Tabernacle Church, which Ms. Tonkin believed was harmful. Ms. Tonkin also had been involved with the church and had recently left. She felt the church was controlling and alienating her sons from her.

Ms. Tonkin contacted the Seattle Community Service Hotline for help. The hotline referred Ms. Tonkin to Parent Awareness and gave her Ms. Landa's home telephone number. When Ms. Tonkin telephoned Ms. Landa she had never heard of CAN and did not believe she was contacting CAN. Ms. Landa did not answer the telephone in any way identifying that she was a contact person for CAN or that she was responding to Ms. Tonkin on behalf of CAN. In fact, Ms. Tonkin testified that never in any of her conversations with Ms. Landa did Ms. Landa suggest she had a current relationship with CAN. Ms. Landa then referred Ms. Tonkin to Rick

Ross. Ms. Tonkin subsequently hired Rick Ross and Ross illegally abducted Mr. Scott. CAN is nowhere to be found in this chain of referrals. CAN did not know about or authorize the referral to Ross. Nor did it know about, authorize, condone or ratify Scott's illegal deprogramming.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's refusal to recognize the First Amendment limitations on derivative liability established by this Court puts non-profit advocacy organizations at great risk. As Judge Kozinski aptly characterized the Ninth Circuit's decision: "It is a bitter object lesson in the dangers of ignoring the Supreme Court's pronouncement in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)." Whether expansive derivative liability can be imposed on a non-profit advocacy organization without some showing that the organization had knowledge of, authorized or ratified the illegal act of its alleged agent consistent with the First Amendment presents an important federal question. The Ninth Circuit's decision here decided that question in a way that conflicts with relevant decision of this Court.

Moreover, the Ninth Circuit's determination that vicarious liability can be imposed under 42 U.S.C. §1985(3) conflicts with decisions of the Seventh and Second Circuit Courts of Appeal, as well as numerous lower courts. This Court's

direction on the proper scope of liability under the federal civil rights act is needed to resolve the conflict.

This case also presents an appropriate opportunity to resolve another conflict between Circuit Courts on the scope of liability under 42 U.S.C. §1985(3). Specifically, the Fourth and the Fifth Circuits have reached exact opposite conclusions whether a religious based animus may form the basis for Section 1985 liability. *Compare World of Faith Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996) and *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981). The Fourth Circuit's decision holding liability can rest on a religious based animus is particularly suspect in light of this Court's decision in *Bray v. Alexander Women's Health Center*, 506 U.S. 263 (1993).

1. The Court of Appeals' Refusal to Limit Application of Derivative Tort Liability in Light of the First Amendment Rights of a Non-profit Advocacy Organization Conflicts With Relevant Decisions of this Court.

The imposition of vicarious liability is particularly suspect when the alleged liable principal is an organization that engages in constitutionally protected associational and speech activity. In such a case, this Court has recognized that special critical attention needs to be applied in

reviewing the imposition of vicarious liability. This special scrutiny is vital to protect against abuses of vicarious liability claims to stifle the activity of organizations such as CAN that are active in controversial arenas. Liability can only be imposed upon a showing that there was authorization, knowledge, or ratification of the unlawful act upon which liability is based. The Ninth Circuit failed to consider these First Amendment implications in affirming the judgment below. Here, there is no evidence that CAN authorized or ratified the illegal abduction of Mr. Scott. Therefore, vicarious liability cannot be imposed upon CAN consistent with the First Amendment.

This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930-31 (1982) emphasized the constitutional protection that should have been afforded the activities of CAN in the case at bar. It noted:

> "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually their voices would be faint or lost." [*Citizens Against Rent Control for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)]. In emphasizing "the

> importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *id.* at 205, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

Claiborne Hardware, 458 U.S. at 908. Moreover, "[t]he right to associate does not lose constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.*

Associational rights of an advocacy organization are implicitly impacted by claims of derivative liability based on the acts of alleged agents/members. As explained by Judge Kozinski in his dissent: "The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. " 151 F.3d at 1250. Because CAN's associational rights are implicated by the verdict in this case, the First Amendment

"imposes a *special obligation* on this Court to examine critically the basis on which liability was imposed." *Claiborne Hardware*, 458 U.S. at 915 (emphasis added).

With these firm constitutional principles guiding its decision, this Court found, in the highly analogous *Claiborne Hardware* case:

> The NAACP -- like any other organization -- of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.
>
> The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, president of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. . . . Similarly, there is no evidence that the

> NAACP ratified -- or even had specific knowledge of -- any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking and official action with respect to the boycott. The NAACP supplied no financial aid to the boycott. . . . The chancellor made no finding that the national organization was involved in any way in the boycott.
>
> **To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment.**

Id. at 930-31 (emphasis added).

The Ninth Circuit distinguished *Claiborne Hardware* with the observation that "CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement in Scott's deprogramming. In *Claiborne Hardware*, the evidence did not tie the NAACP to the purported illegal acts of its representatives; here, CAN has been directly linked to the acts of its agents." 140 F.3d at 1283. Judge Kozinski's discussion at p.

1249 of his dissent from the rejection of en banc consideration succinctly notes the error in the panel's reasoning. The reasoning is inconsistent with the record and fails to address the "big difference between advocating an activity when it is lawful and advocating the same activity when it is unlawful. Fallacious reasoning that conflates the two is especially dangerous in the First Amendment context." 151 F.3d at 1249.

The record in the instant case is bare with respect to any authorization or knowledge on the part of CAN condoning *illegal* deprogramming, including the attempted deprogramming of Mr. Scott. Both testimonial and documentary evidence unambiguously proved CAN's policy opposing illegal deprogramming for anyone, including Mr. Scott. Judge Beezer writing for the panel majority outlined the evidence against CAN but did not cite any evidence showing CAN supported *illegal* deprogramming. The evidence referenced by Judge Beezer regarding "involuntary, although not illegal, deprogramming" is an insufficient basis under *Claiborne Hardware* to impose vicarious liability. 140 F.3d at 1282.

Mr. Scott's case also relies on efforts to taint CAN by its limited prior association with Mr. Ross and other deprogrammers. "Recognizing that guilt by association is a philosophy alien to the traditions of a free society . . . and the First Amendment itself, we have held that civil or criminal disabilities may

not be imposed on one who joins an organization which has among its purposes the violent overthrow of the government, unless the individual joins knowing of the organization's illegal purposes and with the specific intention to further those purposes." *Claiborne Hardware*, 458 U.S. at 931. In the instant case, CAN should not fare worse. Yet, the Ninth Circuit "literally holds CAN guilty by association." Kozinski, J. (dissent), 151 F.3d at 1248.

CAN is an educational organization that engages in protected First Amendment activity in an area rife with controversy. As a result, CAN has been a target for several (unsuccessful) lawsuits. *E.g., Hart v. CAN*, 13 Cal.App.4th 777, 16 Cal. Rptr. 2d 705 (1993). This is precisely the type of situation addressed by the Supreme Court in *Claiborne Hardware*, which requires a heightened standard of judicial scrutiny and direct evidence linking the organization to involvement in the alleged illegal act. The Ninth Circuit failed to so extend CAN's First Amendment protection. As Judge Kozinski correctly concluded about the decision: "We have taken a great leap backwards in the protection of First Amendment freedoms." 151 F.3d at 1250.

2. The Ninth Circuit's Determination to Hold CAN Liable for Conspiracy on a Vicarious Liability Theory under 42 U.S.C. §1985 Conflicts With Decisions of Other Circuits.

The Ninth Circuit acknowledged it has not previously determined whether vicarious liability can be imposed under 42 U.S.C. § 1985(3).[2] 140 F.3d at 1284. In analyzing the issue, the Ninth Circuit dismissively ignored other precedent as non-binding authority. *Id.* The Court concluded vicarious liability could be imposed on CAN. *Id.*

This holding creates conflicts with well established doctrines of other jurisdictions. Numerous federal courts have held flatly that vicarious liability may not be imposed under § 1985(3). *See Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1272 (7th Cir. 1984); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1974); *Howard v. Topeka-Shawnee County Metropolitan Planning Commission*, 578 F. Supp. 534, 538 (D. Kan. 1983); *Carnegie v. Miller*, 811 F. Supp. 907,

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[2] In general terms, 42 U.S.C. §1985(3) renders unlawful conspiracies to deprive persons of equal protection of the law or of equal privileges and immunities under the law. 42 U.S.C. §1985(3). Under this statute, a plaintiff must show some racial or other class-based discriminatory animus that underlies the conspirators' conduct. *See United Bhd. of Carpenter & Joiners v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*, 403 U.S. 88 (1971)

914 (S.D.N.Y. 1993); *Hankins v. City of Philadelphia*, 1998 U.S. Dist. LEXIS 5101, at * 38 (E.D. Pa. April 9, 1998). Even district courts within the Ninth Circuit have adhered to the rule against the imposition of vicarious liability in § 1985(3) cases. *See Luke v. Abbott*, 954 F. Supp. 202, 203 n.1 (C.D. Cal. 1997); *cf. Vasquez v. City of Reno*, 461 F. Supp. 1098, 1102 (D. Nev. 1978); *cf. Meza v. Lee*, 669 F. Supp. 325, 326 (D. Nev. 1987).

These courts have rejected the applicability of the doctrine of respondeat superior to 42 U.S.C. §1985(3) cases on two related grounds. First, a number of circuit and district courts have applied this Court's holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a case decided under 42 U.S.C. §1983, a related statute, to conspiracy claims brought under 42 U.S.C. §1985(3). *See e.g., Bell*, 746 F.2d at 1272; *Owens*, 601 F.2d at 1247; *Brown v. Washington*, 661 F. Supp. 1011, 1012 (N.D.Ill. 1987); *Carnegie*, 811 F. Supp. at 914; *Luke*, 954 F. Supp. at 203, n.1.

In *Monell*, this Court held that a municipality is subject to damages liability under 42 U.S.C. §1983 for the unconstitutional acts of its employees. The Court further held, however, that such liability cannot result merely from a theory of respondeat superior. *Id.* at 691-94. In rejecting the doctrine of vicarious liability, the Court did not relieve municipal entities from all liability for deprivations of citizens' constitutional rights. Rather, it clarified

that such liability may be imposed only for acts taken by the entity which fairly tie it to the unlawful deprivation. According to the Court: liability can be imposed only if the acts at issue were performed pursuant to "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. *See also Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (reaffirming that a municipality's policy must be "the moving force of the constitutional violation"). Thus, under *Monell* and its progeny, direct liability must be established. *Brown*, 661 F. Supp. at 1012 (citing *Bell*, 746 F.2d at 1269 and *Owens*, 601 F.2d at 1242).

Other jurisdictions have rejected the application of vicarious liability to 42 U.S.C. §1985(3) claims on similar grounds, requiring a direct link between the conduct of the principal and the plaintiff. *See, e.g., Adams*, 445 F.2d at 107 (requiring a showing of "overt acts on the part of the [principal]"); *Howard*, 578 F. Supp. at 538-39 (the alleged conspirator "must be shown to have been directly involved in a deprivation of plaintiff's civil rights") (citing *Lessman v. McCormick*, 591 F.2d 605, 612 (10th Cir. 1979)).

The Ninth Circuit decision contends that adoption of a rule against vicarious liability under 42 U.S.C. §1985(3) would be tantamount to adopting a rule that organizations or entities can escape liability. These concerns, however, readily

dissipate under a careful analysis of the pertinent authorities, including the Ninth Circuit cases relied upon by the Majority.

Under the standards articulated above, organizations and entities are not immune from liability under 42 U.S.C. §1985(3). Courts have recognized that both public and private entities can be held liable under 42 U.S.C. §1985(3) in an appropriate case where facts demonstrate that the entity has taken overt steps or has carried out an official policy or practice which has resulted in the deprivation of an individual's civil rights. *Cf. Owens*, 601 F.2d at 1247 (finding that plaintiff may be able to plead allegations sufficient to state a cause of action against a governmental entity); *Hankins*, 1998 U.S. Dist. LEXIS at * 38 (suit against union failed to plead that any union officer possessed requisite racial animus to enter into a conspiracy); *Callahan v. Commonwealth Land Title Insurance Co.*, 1990 U.S. Dist. LEXIS 14524 (failure demonstrate racial or other class-based animus by several companies that underwrite or sell title insurance).

As described, *supra*, there was no evidence of any overt acts by CAN or any policy or practice of CAN knowingly referring persons to deprogrammers who engaged in *illegal* deprogrammings such as the one to which Mr. Scott was

subjected.[3] Under the standards precluding vicarious liability for entities or organizations under 42 U.S.C. §1985(3) cited above, there was no legal basis upon which to hold CAN liable for conspiracy.

3. Finding CAN Liable Under 42 U.S.C. §1985(3) Based on an Alleged Animus Towards Religion Conflicts with the Decision of Another Circuit

CAN was found liable under 42 U.S.C. §1985(3) based on a "discriminatory animus towards [Mr. Scott's] religious affiliation." Order of the United States District Court Denying Motion for New Trial, Appendix D, p. 5. In addition to the decision in this case, the Fourth Circuit has ruled that a religious animus can form the basis for a Section 1985 (3) claim. *Ward v. Conner*, 657 F.2d 45 (4th Cir. 1981). See also the cases cited therein, 657 F.2d at 48. In contrast, the Fifth Circuit, in a decision filed after the trial in this case, squarely declined "to extend the reach of Section 1985(3) to include conspiracies motivated by religious, as opposed, to racial animus." *World of Faith Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996). This Court to date has not allowed any class-based animus, other than racial animus, to form the basis for a claim under 42 U.S.C. §1985(3). This case presents the

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[3] CAN policy to refer persons for *lawful* involuntary deprogrammings is an insufficient basis to impose vicarious liability.

opportunity to resolve, strictly as a matter of law, this conflict between Circuits.

In *Griffin v. Breckenridge*, 403 U.S. U.S. 88 (1971), this court recognized that 42 U.S.C. §1985(3) did reach private conspiracies based on a racial discriminatory animus. This Court further held out in dicta that "perhaps" there may be other class-based animus that would also form the basis for a Section 1985 (3) claim. *Id.* at 102. This Court has not resolved the "perhaps" in any definitive way and certainly not with respect to religion as a class. Frankly, the courts in *Ward* and in *World of Faith* reached their respective opposite conclusions without much analysis. The important question whether religious class-based animus can form the basis for a Section 1985(3) claim needs guidance from this Court.

This case also presents the opportunity for the Court to further delineate the application of *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263 (1993) which involved the assertion of a Section 1985(3) claim against a controversial advocacy organization. In *Bray*, this Court refused to extend Section 1985 liability against demonstrators at an abortion clinic. First, this Court noted that "[w]hatever may be the precise meaning of 'class' for purposes of *Griffin's* speculative extension of Section 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage

in conduct that the Section 1985(3) defendant disfavors." 506 U.S. at 269. This Court concluded that "'Woman seeking abortion'" is not a qualifying class." *Id.* The claimed animus in this case -- "towards [Mr. Scott's] religious affiliation" -- seems equally flawed.

Next in *Bray*, this Court considered the contention whether a desire to stop voluntary abortions could be deemed a class-based animus against all women sufficient to support a Section 1985 claim. This Court refused to find that an animus to abortion translated into an animus against women. Significantly, this Court noted that there were rational bases for opposing abortion that were not based on hatred of women. 506 U.S. at 760. Similarly, in this case, CAN's alleged animus against organizations that destructively use mind control techniques does not translate into a general animus against religion. The claim suffers from flaws in that there are non-religious grounds for opposing the destructive use of mind control techniques and that CAN's opposition extends only to a very limited group of religious organizations, not generally to all religious organizations. Moreover, CAN's concerns extend to non-religious organizations as well as religious organizations.

Finally, in *Bray*, this Court concluded that for a claim to be stated under Section 1985(3), the alleged animus must be of a type of "harsh" discrimination akin to racism. 506 U.S. at 274.

Opinions that are reasonably susceptible to disagreement or conflicting value judgments do not qualify as invidious discriminatory animus. *Id.* Here, whether one agrees or disagrees with CAN's mission to educate about harmful mind control and cults, the issues CAN raises are certainly susceptible to reasonable differing opinions and value judgments. Simply because Respondent's counsel would argue the opposite, just as abortion supporters claim that invidious sexism is behind opposition to abortion, does not alter this conclusion. One of the lessons of *Bray* is that Section 1985(3) should not be used as a tool to resolve the disputes between ideologically or philosophically opposed organizations. The decision in the *Scott* case, however, goes far to undermine that lesson and should be reversed.

CAN acknowledges that the Ninth Circuit did not pass upon the question whether a religious based animus can support a Section 1985(3) claim. Exceptional circumstances exist, however, to justify this Court addressing the issue here. First, the question is "a pure issue of law, appropriate for . . . immediate resolution." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982). Moreover, the question is in a "state of evolving definition" and "one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991). The interests of justice certainly would be best served by granting review of this important question.

4. The Questions Presented Are Important

The questions presented for review raise important issues broadly affecting the potential exposure of non-profit organizations throughout the United States. Non-profit organizations play a vital societal role advocating different and sometimes controversial points of views. Such discourse is, of course, at the core of the First Amendment as is the right of persons to associate through non-profits to enhance their message. Non-profits primarily operate through the work of unpaid part-time volunteers. To subject a controversial advocacy organization to traditional notions of vicarious liability because of the act of one of its volunteers creates serious threats to the First Amendment values advanced through the operations of such organizations. As this Court stated in *Claiborne Hardware*: "The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit." 458 U.S. at 932.

Such threats are real. As Judge Kozinski stated: "Is 'destruction by lawsuit' a judicial fantasy, a chimera? Indeed not. This is the very case that put CAN out of business. . . . CAN effectively died as a direct result of this judgment, and the mission its supporters set out to accomplish died with it." 151 F.3d at 1250. A decision that silences the message of an advocacy organization has serious nationwide consequences.

Where First Amendment values are implicated, therefore, the courts must impose some limit on application of traditional tort vicarious liability. Specifically, liability should only be imposed where the organization bears some direct responsibility for the illegal act at issue by way of authorization or ratification. In other words, only an organization's advocacy of illegal acts should be punished. Where an organization advocates legal, although controversial, activity and is linked to tortious activity only through the unauthorized and unratified acts of its volunteer 'agent", liability cannot be imposed consistent with First Amendment values. Otherwise, organizations across the political spectrum will face the same threat as CAN and find their message, like CAN's, silenced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: _____

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON SCOTT,
Plaintiff-Appellee,
v.
RICK ROSS, aka RICKEY ALLEN ROSS; MARK WORKMAN; CHARLES SIMPSON,
Defendants,
and
CULT AWARENESS NETWORK, a California Non-Profit Corp.,
Defendant-Appellant

No. 96-35050

D.C. No.
CV-94-00079-JCC

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
September 11, 1997 – Seattle, Washington

Filed April 8, 1998

Before: Mary M. Schroeder and Robert R. Beezer,
Circuit Judges, and William W Schwarzer,*
Senior District Judge.

Opinion by Judge Beezer; Dissent by Judge Schwarzer

*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

OPINION

BEEZER, Circuit Judge:

Defendant-appellant Cult Awareness Network ("CAN") appeals the jury's verdict finding CAN liable for conspiracy and negligence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In 1991, Kathy Tonkin and her six children joined the Life Tabernacle Church ("Life Tabernacle"), a branch of the United Pentecostal Church International. Tonkin remained a member for over a year before withdrawing. She urged her sons to withdraw from Life Tabernacle, but her three oldest sons, appellant Jason Scott ("Scott"), Thysen and Matthew, refused. At the time Scott was 18 years of age, Thysen, 16 and Matthew, 13.

Tonkin believed Life Tabernacle had a destructive effect on her sons and sought help in having them removed from the church's influence. Tonkin contacted Shirley Landa after a referral from the Seattle Community Service hotl

ine. Landa was involved in various "anti-cult" activities and worked as CAN's Washington state "contact." A "contact" is "an unpaid volunteer who is available in given areas to speak to members of the public on behalf of CAN." CAN has described itself as "a national nonprofit organization founded to educate the public about the harmful effects of mind control as used by destructive cults." CAN operates nationally through volunteer contacts and affiliates. CAN has only four paid staff members, a full-time Executive Director and three part-time staff.

Landa referred Tonkin to Rick Ross, whom Tokin hired to "deprogram" her three sons. Although the record is somewhat unclear as to the specific nature or origin of Landa's

relationship with Ross, it is clear that Landa was aware Ross performed involuntary deprogrammings because she had seen Ross do so on the television prog

ram "48 Hours." Ross was known to, and received referrals from, other CAN members as well.

Ross performed "successful" involuntary deprogrammings on Thysen and Matthew, who were minors and therefore within their mother's control. Tonkin, Landa and Ross knew that to deprogram Scott would be more difficult legally be

cause Scott was 18 years of age. Nonetheless, Ross, with the aid of defendants Simpson, Workman and Rotfroff, attempted to deprogram Scott. They abducted Scott and held him captive for five days, during which Ross "debated" Life Tabernacle's teachings with Scott. Tonkin planned to send Scott to a deprogramming center in Ohio after Ross completed the deprogramming. After several days, Scott feigned acceptance of Ross' positions, escaped and filed this suit.

Scott claimed Ross, Simpson, Workman, Rotfroff and CAN conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985(3). Scott also brought state law tort claims for negligence and outrage. Scott's claim against CAN was based upon CAN's vicarious liability for the acts of its alleged agent, Landa.

Rotfroff settled with Scott before trial. After a six-day trial, a jury found the remaining defendants liable for civil rights violations and negligence and awarded Scott $875,000 in compensatory damages and $4 million in punitive damages. The jury allocated 10% of the negligence liability and $1 million in punitive damages against CAN. CAN appeals.

CAN raises a variety of arguments on appeal. CAN principally focuses on the issue of Landa's agency: (i) CAN con-

tends that the district court's jury instructions failed to follow Washington's agency law, and (ii) CAN argues that the evidence was insufficient to impose liability because the evidence demonstrated neither that Landa acted as CAN's agent nor that Landa acted within the scope of any alleged authority. CAN claims that the imposition of liability based upon Landa's acts violates CAN's First Amendment rights. CAN contends that liability may not be imposed on it pursuant to 42 U.S.C. § 1985(3). CAN challenges the admission of the testimony of Scott's expert, Dr. Anson Shupe. We reject each of CAN's arguments.

II

CAN argues that the district court's agency instruction did not accurately describe Washington state agency law. We review a district court's formulation of civil jury instructions for an abuse of discretion. *See Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995).

[1] In Washington, a principal is liable for the negligent acts of its agent when the agent acts on behalf of the principal and within the scope of employment. *See Roletto v. Department Stores Garage Co.*, 191 P.2d 875, 877 (Wash. 1948) (a principal's liability rests on a showing "that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of a wrong; and the relation must exist at the time, and in respect to the particular transaction out of which the injury arises."). If the agent is not acting on the principal's behalf at the time of the act in question, then the principal is not liable for that act. *Id.* This rule applies to agents who are volunteers. *See Abel v. Firs Bible and Missionary Conference*, 360 P.2d 356, 358 (Wash. 1961).

[2] The district court's agency jury instructions properly described these principles. CAN's argument that the jury instructions did not allow the jury to conclude that Landa

might be an agent of CAN for some purposes, but not for the purposes of Scott's deprogramming, is not persuasive. The district court's instructions, read as a whole, properly address CAN's concern. The district court instructed:

> The defendant Cult Awareness Network is sued as a principal. The plaintiff claims that Shirley Landa was acting as the Cult Awareness Network's agent in making the referral of Rick Ross to Kathy Tonkin. CAN denies that Shirley Landa was acting as CAN's agent and that Ms. Landa was at the time she made the referral acting within the scope of her authority.
>
> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission within of Ms. Landa was the act or omission of CAN. If you find Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.[1]

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[1] The district court's entire agency instruction reads:

> Under the law, a corporation is a person. The defendant Cult Awareness Network is a corporation. it can only act through its employees, agents, directors or officers; therefore, a corporation is responsible for the acts of its employees, agents, directors and officers performed within the scope of their authority.
>
> An agent is a person who performs services for another person under an express agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal.
>
> One may be an agent without receiving compensation for services. The agency agreement may be oral or written. An agent is acting within the scope of authority if the agent is engaged in the performance

The district court's reference to CAN's theory, coupled with the ensuing instruction requiring a showing that Landa "was acting within the scope of her authority," accurately states Washington agency law. These instructions differ only slightly from CAN's proposed instruction which reads: "[CAN] can be liable to Scott only if Shirley Landa was acting as its agent when she provided Scott's mother with the name and telephone number of Rick Ross."[2] The district court properly instructed the jury.

> of duties which were expressly or impliedly assigned to the agency by the principal. Any act or omission of an agent within the scope of authority is the act or omission of the principal.
>
> The defendant Cult Awareness is sued as a principal The plaintiff claims that Shirley Landa was acting as the Cult Awareness Network's agent in making the referral of Rick Ross to Kathy Tonkin. CAN denies that Shirley Landa was acting as CAN's agent and that Ms. Landa was at the time she made the referral acting within the scope of her authority.
>
> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission of Ms. Landa was the act or omission of CAN. If you find Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.

[2] CAN proposed the following jury instruction:

> In order to hold the Cult Awareness Network liable for Scott's alleged injuries, you must find that Shirley Landa was acting as the Cult Awareness Network's agent at the time, and with respect to the particular transaction out of which Scott claims his injury arises. In other words, Cult Awareness Network can be liable to Scott only if Shirley Landa was acting as its agent when she provided Scott's mother with the name and telephone number of Rick Ross.

III

CAN argues that the evidence was insufficient to impose liability on CAN because the evidence failed to demonstrate that Landa acted as CAN's agent and that she acted within the scope of her authority. We review de novo a district court's denial of a motion for judgment as a matter of law. *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 354 (9th Cir. 1996). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Acosta v. City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied*, 117 S. Ct. 514 (1996). We review a district court's denial of a motion for a new trial for an abuse of discretion. *Wharf v. Burlington Northern R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995).

[3] CAN may be held liable for Landa's acts if those acts were on CAN's behalf and within the scope of Landa's agency. *E.g., Roletto v. Department Stores Garage Co.*, 191 P.2d 875 (Wash. 1948); *Thompson v. Everett Clinic*, 860 P.2d 1054, 1056 (Wash. Ct. App. 1993) ("In order to hold an employer vicariously liable for the tortious acts of its employees, it must be established that the employee was acting in furtherance of the employer's business and that he or she was acting within the course and scope of employment when the tortious act was committed."), *review denied*, 877 F.2d 694 (Wash. 1994). In addition, "[a]gency requires that both parties consent to the relationship and that the principal exercise control over the agent." *Nordstrom Credit, Inc. v. Department of Revenue*, 845 P.2d 1331, 1335 (Wash. 1993). Agency may be proven with circumstantial evidence. *Griffiths v. Big Bear Stores, Inc.*, 347 P.2d 532, 535 (Wash. 1959) (citing *Smith v. Leber*, 209 P.2d 297, 301 (Wash. 1949)). Our review of the record discloses evidence that supports the jury's finding of agency and that meets the district court's instruction.

The evidence demonstrates that Landa, who referred Tonkin to Ross, and who was aware of the plan to deprogram Scott, was a CAN contact person. Landa testified that she was designated as a CAN contact person for Washington state and had been on CAN's list of contact persons for years. Landa, who belonged to several other cult-related organizations, had a long-standing relationship with CAN. She was a founder of the Citizens Freedom Foundation ("CFF"), the predecessor organization to CAN, and a former member of CAN's board. Although Landa testified that she received fewer than five referrals per year from CAN, it appears she did, in fact, receive CAN referrals concerning "cult" matters in Washington.

The evidence indicates that CAN functioned through its contact people. William Rehling, CAN's president, stated that "[c]ontact people are people who are available to be contacted to encourage communication . . . so that if . . . someone needed to speak with a representative of CAN, they can deal with the contact person." When asked if contact people were "representatives" of CAN, Rehling replied that CAN's contacts were "people who are available to talk to people who have the need or desire to discuss CAN with or cults with someone" and who "facilitate communication." When asked how contact people encountered members of the public, Rehling explained that, "[a] contact person is someone that could be . . . given to that person initially as just someone to speak with, or its possible that it would work the other way, that somebody, the CAN office, might suggest they speak to a contact person. Both of those are possible." Rehling stated that CAN authorized its contact people to represent to the public that the contact people were assisting on behalf of CAN.

The evidence shows CAN controlled the appointments of its contact people and had the right to terminate them. Rehling testified that CAN chose its contact people by

considering their commitment to CAN, their willingness to serve as contact people, their history of good relations with CAN, and their perceived agreement with CAN's tenets. Rehling though that CAN might have issued policies concerning how contact people should conduct themselves with the public and that the contact people might have to sign agreements with CAN. Rehling acknowledged that CAN could remove from its list of contact persons any contact person who engaged in misconduct.

The evidence indicates that it was CAN's practice to refer people to deprogrammers, including Rick Ross, and that Ross was known to engage in involuntary deprogramming. Tonkin said Landa described Ross as "a very successful deprogrammer" with a "very, very high success rate." Martin Butz, a CAN employee who answered CAN's national hotline, estimated he referred a "few hundred" people to "exit counselors," *i.e.*, deprogrammers who did not engage in forcible interventions. Butz acknowledged that he referred people to Rick Ross. Although Butz claimed he was unaware of Ross engaging in *illegal*, involuntary deprogramming, Butz admitted he was "aware" of the "48 Hours" television program. concerning Ross. That program reported that Ross restrained a fourteen-year-old boy and conducted an involuntary, although not illegal, deprogramming. Butz said that after the broadcast of the "48 Hours" program, people requested Ross' name and telephone number from him. Although Butz said he had not referred anyone to Ross in the past two and a half to three and a half years, Butz admitted providing the requested information on perhaps six occasions.

Although Ross did not specifically recall receiving any referrals from Butz, Ross acknowledged that he "may have received referrals for information from the Cult Awareness Network." He also remembered "receiving some calls and people said that they – they may have said that they had talked to CAN or some other organization." When asked if

CAN's referrals to him led to "exit counseling" or deprogramming, Ross acknowledged that the referrals "for information" "may have resulted" in his being "retained . . . for some purpose," such as voluntary "exit counseling."[3]

Other evidence was admitted that concerned Ross' contact with CAN and CAN's awareness of Ross. For example, Ross had applied to be the executive director of CFF. Ross acknowledged he corresponded with Priscilla Coates, CFF's executive director. In a letter to Coates, Ross indicated that he wanted to complete two more exit counseling cases that year in order to support one of his projects, and wrote "a couple of cases right now would be great. Do you know of anything?" In the letter, Ross stated that Cynthia Kisser, CAN's executive director, had given him a "couple of referrals." Ross included in his promotional materials testimonials from CAN directors. Coates stated at a testimonial that she had "referred many families, friends, siblings and inquiries of all kinds to Rick." Ross attended CAN conferences in Los Angeles, Oklahoma City, Chicago and Dallas.

[4] In summary, there is sufficient evidence, if believed by the jury, to establish that Landa was a CAN contact person; that CAN functioned through its contact people, that CAN members routinely referred people to deprogrammers, including Ross; that Ross conducted involuntary deprogrammings; and that CAN was aware of Ross and the fact he conducted involuntary deprogrammings. The evidence was sufficient to support the jury's verdict on the question of Landa's agency with respect to her referral of Tonkin to Ross.

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[3] Ross even stated that he "may have been considered a contact person for CAN in [his] capacity at Jewish Family and Children Service during the early '80s," although he was not sure who considered as such.

IV

[5] CAN argues it should not be held liable for Scott's injuries because, even if Landa acted as CAN's agent, Landa's referral of Tonkin to Ross was an act beyond Landa's authority as a CAN agent. However, as discussed *supra*, the evidence establishes that CAN members routinely referred callers to deprogrammers, including involuntary depro-grammers; thus, Landa's referral of Tonkin to Ross did not violate CAN's actual practices. CAN's "official" policy prohibiting involuntary deprogramming neither undermines the evidence concerning CAN's practices nor precludes imposition of vicarious liability. *E.g.*, *Smith v. Leber*, 209 P.2d 297, 303 (Wash. 1949) (respondents cite no case holding that an express prohibition against the doing of a certain act absolves an employer from liability, where such an act was done in conjunction with other acts which were within the scope of the duties an employee has been instructed to perform.) Because Landa acted within the scope of her authority, there is no reason to set aside the jury's verdict.

V

CAN argues for the first time on appeal that the imposition of vicarious liability for Landa's acts violates CAN's First Amendment speech and associational rights. Generally, we do not consider issues raised for the first time on appeal. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). Nonetheless, we have discretion to review issues not raised below when, as here, "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.*

CAN relies primarily on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Claiborne* involved a

boycott against certain white businesses in Mississippi by African-American residents. After discussing the protestors' speech and associational rights, the Supreme Court stated that the NAACP representative was not liable for his speech because it "did not exceed the bounds of protected speech." *Id.* at 929. Because the NAACP's spokesman was not liable, the NAACP, as his principal, could not be held liable. Although the NAACP and its members had well-recognized associational rights, the NAACP, "like any other organization," would be held liable for any actionable conduct of its agents "undertaken within the scope of their actual or apparent authority." *Id.* at 930.

[6] *Claiborne* is distinguishable from the instant case. CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement in Scott's deprogramming. In *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa.

VI

CAN argues that: (i) it cannot be held vicariously liable for conspiracy under § 1985(3), and (ii) even if it could be held liable, the evidence presented fails to establish that CAN engaged in any conspiracy to violate Scott's rights.

A. Vicarious Liability

CAN argues that vicarious liability cannot be imposed under § 1985(3).[4] Although CAN raises this issue for the first time on appeal, we may review purely legal issues raised for the first time on appeal if the record was fully

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[4] It appears that CAN could have challenged – perhaps successfully – the § 1985(3) judgment against it on other grounds. However, CAN has waived any such arguments by failing to raise them on appeal.

developed at trial. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). We review de novo questions of law. *United States v. Gutierrez*, 116 F.3d 412, 415 (9th Cir. 1997).

Neither CAN nor Scott cites to binding authority concerning the imposition of vicarious liability under § 1985(3). Instead, both parties rely on cases concerning 42 U.S.C. § 1983. Can argues that liability does not arise under § 1985 on theories of respondeat superior or vicarious liability. Scott contends that CAN's liability is premised on CAN's policy and practices condoning involuntary programming; in effect, Scott attempts to graft § 1983 principles concerning municipal liability onto § 1985(3). We have yet to adopt either view in this circuit.

[7] The parties have not offered persuasive reasons why we should adopt their arguments. We are reluctant to adopt wholesale § 1983 principles with respect to § 1985(3) in light of the fact that, unlike § 1985(3) was intended to reach "private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment." *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 833 (1983). With a few exceptions, claims brought pursuant to § 1985(3) do not require state action. *See id.* at 830 (the exception is that a conspiracy to infringe first Amendment rights does not violate § 1985(3) unless there is state involvement or the conspiracy's aim is to influence state activity). The same cannot be said with respect to § 1983. The policy and practice limitation on municipal liability under § 1983 shields governmental agencies from liability for unauthorized actions of its officers to a greater extent than traditional respondeat superior principles do; given this, to replace traditional principals of vicarious liability with a "policy and practice" theory of liability with respect to private actors strikes us as suspect.

[8] To adopt CAN's argument that there is no vicarious liability under § 1985(3) would be tantamount to adopting a

rule that private organizations or entities can never be liable under § 1985(3). That is not the law of this circuit. In *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979), we reversed the dismissal of plaintiff's complaint where plaintiff was a female disability insurance policyholder who sued the California State Insurance Commissioner and several insurers. In *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th Cir. 1994), we reversed the dismissal of plaintiff's complaint where plaintiff was a black physician who sued a hospital and members of the hospital's supervisory committee. Although we did not explicitly address the issue of vicarious liability in these cases, it is apparent that in absence of some type of vicarious liability, the entity defendants could not have been liable.

[9] We conclude that vicarious liability may be imposed on CAN in this action. Under either traditional principles of respondeat superior or "policy and practice" principles, CAN would be liable. Landa acted as CAN's agent, and Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers.

B. Sufficiency of the Evidence

CAN argues that even it if is liable under § 1985(3) for Landa's acts, the evidence fails to establish that Landa was aware of any plan to deprogram or abduct Scott, and that even if she was aware of this plan, she did not participate in it. The record shows otherwise.

[10] A plaintiff alleging a conspiracy under § 1985(3) must establish: the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; an act in furtherance of the conspiracy; and a resulting injury. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992) (citing *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983)). "A conspiracy can be inferred from conduct and need not be proven by evidence of an express

agreement." *Ward v. Equal Employment Opportunity Comm'n*, 719 F.2d 311, 314 (9th Cir. 1983).

[11] The record shows Landa was involved in the agreement to deprogram Scott and thereby violate his civil rights. Landa referred Tonkin to Ross, and Landa was aware of Ross' methods. Tonkin indicated that Landa referred to Ross as "a very successful deprogrammer" with a "very, very high success rate." Landa knew Ross conducted involuntary deprogramming, as indicated by the fact she saw the "48 Hours" program in which Ross involuntarily deprogrammed a minor. Landa was involved in the deprogramming of Scott's younger brothers. Tonkin discussed and planned the deprogramming of Scott with Landa. Landa advised Tonkin of the possible legal problems involved in Scott's deprogramming. Landa told Tonkin that the only way properly to deprogram Scott was to abduct and deprogram him. The fact Ross contacted Landa for "legal advice" after his arrest is further evidence of her complicity. *See United States v. Calabrese*, 825 F.2d 1342, 1348 (9th Cir. 1987) (knowledge of and participation in conspiracy can be inferred from circumstantial evidence and from defendant's actions) (citation omitted).

CAN's reliance on Landa's testimony to establish that she was not involved in the alleged conspiracy is not persuasive. In denying CAN's motion for judgment as a matter of law or for a new trial, the district court noted that the jury was justified in discounting Landa's testimony given "the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies on her testimony.

VII

CAN argues that the admission of the testimony of Dr. Shupe, whom Scott proffered as an expert in the "anti-cult movement," violated Rules 702 and 703 of the Federal Rules of Evidence. In general, we review the admission of expert

testimony for an abuse of discretion. *United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995).

CAN moved in limine to exclude Dr. Shupe's testimony, but CAN did not object to his testimony at trial. We have "reject[ed] an invariable requirement that an objection that is the subject of an unsuccessful motion in limine be renewed at trial." *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986). Instead, "where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence." *Id.*; *see also United States v. Lui*, 941 F.2d 844, 846 (9th Cir. 1991).

[12] The issue of the admissibility of Dr. Shupe's testimony was not properly preserved for review because the district court's ruling lacked the necessary definitiveness. When Scott sought to qualify Shupe as an expert at trial, the district court stated that, "in my view of the rules, Counsel, it is up to the jury to determine the expertise if there is no objection to [Dr. Shupe's] testimony." In other words, although Scott was not precluded from calling Dr. Shupe as an expert, the district court would consider objections to specific testimony elicited. Despite this warning to CAN's counsel, CAN failed to object to Dr. Shupe's testimony on rule 702 or 703 grounds. Later, the district court expressed surprise at CAN's failure to object during Dr. Shupe's testimony and noted its willingness to consider objections to Dr. Shupe's testimony. Even then, at the district court's prompting, CAN failed to object or to move to strike Dr. Shupe's testimony. Rather, CAN's attorney admitted that after the denial of CAN's motion in limine, CAN made a "strategic decision" to "deal with it." In these circumstances, we review the admission of evidence for plain error. *Cf. United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995). The fact that the district court might have sustained

objections, had they been made, does not mean that the district court wrongly admitted Dr. Shupe's testimony.

[13] Turning to the merits of CAN's argument, CAN contends that Dr. Shupe's testimony was inadmissible under Rule 702 of the Federal Rules of Evidence. Rule 702 allows for the admission of expert testimony that will aid the trier of fact in understanding the evidence or determining a fact in issue.[5] There are four factors to consider in determining if expert testimony will assist the trier of fact: (i) whether the expert is qualified; (ii) whether the subject matter of the testimony is proper for the jury's consideration; (iii) whether the testimony conforms to a generally accepted explanatory theory; and (iv) whether the probative value of the testimony outweighs its prejudicial effect. *United States v. Castaneda*, 94 F.3d 592, 595 (9th Cir. 1996) (citing *United States v. Rahm*, 993 F.2d 1405, 1409 (9th Cir. 1993)).

[14] The district court properly admitted Dr. Shupe's testimony. Shupe is qualified; he is a professor of sociology who has studied and written about the "anti-cult movement" for the last 19 years. *See Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (Rule 702 "contemplates a broad conception of expert qualifications."). CAN's argument that Shupe did not specifically study CAN or its practices does not undermine Shupe's credibility. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997) (fact that expert's opinions were based on data collected by others was immaterial to determining whether opinions were admissible).

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[5] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[15] Shupe's testimony was proper for the jury because he testified regarding matters beyond the general knowledge of jurors. That is, Shupe discussed the history and general practice of deprogramming and the origin and practices of the "anti-cult movement." That CAN denies either endorsing or performing violent deprogrammings does not make Dr. Shupe's testimony excludable. This matter was taken up on cross-examination, and the merits of Dr. Shupe's opinion was properly challenged by showing his inability to point to specific CAN literature endorsing violent deprogrammings. Shupe's opinion as to the entrepreneurial nature of deprogramming and its origins in religious intolerance was not inappropriately admitted. Just as CAN questioned the credibility of Dr. Shupe, so too the jury was free to disregard his testimony.

[16] Dr. Shupe's testimony conformed to a generally accepted explanatory theory, as indicated by his citation to other authors, primarily collaborators, who have discussed theories consistent with his. Because Dr. Shupe provided the jury with useful information about the anti-cult movement and was available for cross-examination, defeating in large part any concerns of prejudice, the probative value of his testimony outweighed any prejudicial effect.

[17] CAN argues that the admission of Dr. Shupe's testimony violated Rule 703 of the Federal Rules of Evidence. Rule 703 allows an expert witness to form an opinion based on facts or data either before or at the hearing. The facts or data relied upon need not be otherwise admissible if they are "of a type reasonable relied upon by experts in a particular field." Fed. R. Evid. 703.[6] CAN

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[6] Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before

argues that Dr. Shupe's opinions were based on newspaper articles, certain pretrial testimony and conversations with colleagues, all of which, CAN contends, fail to constitute evidence "reasonably relied" on by experts in Dr. Shupe's discipline. CAN argues that Shupe's testimony lacks any indicia of trustworthiness to merit consideration of hearsay materials. However, Shupe's citations to his extensive studies and to his collaboration with other academics as the basis for his opinions suffice to merit admission of his testimony.

The judgment of the district court is AFFIRMED.

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the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

SCHWARZER, Senior District Judge, dissenting:

I respectfully dissent.

The evidence presented at trial was insufficient to support the jury's finding that CAN was liable for the consequences of Landa's negligent referral. Under Washington law, to impose liability on a principal for the acts of its agents, a plaintiff must establish not only the existence of an agency relationship but also that "the relation . . . exist[ed] at the time, and in respect to the particular transaction of which the injury arises." *Hamm v. Camerota*, 290 P.2d 713, 715 (Wash. 1955); *Roletto v. Department Stores Garage Co.*, 191 P.2d 875, 877 (Wash. 1948).[1] There was ample evidence for the jury to find that Landa, as a CAN-appointed contact person, was CAN's agent. However, there was no evidence from which the jury could find that Landa acted as CAN's agent "in respect to the particular transaction out of which the injury arises." The relevant evidence showed the following:

Landa belonged to several cult-related organizations in addition to CAN. She was listed on the Seattle crisis hotline as "Parents Awareness." Tonkin called Community Services and then reached Landa on her private line. Tonkin had never heard of CAN when she called Landa and did not learn about CAN until later. She testified she thought Landa was involved with Community Services, not CAN. Scott presented no evidence, direct or circumstantial, that Landa was acting on directions or instructions of CAN, or that CAN knew of Landa's referral of Tonkin (or, for that matter, of

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[1] The majority relies upon this interpretation of Washington state law in upholding the jury instructions, *see* Op. at 3212; however, it ignores this interpretation in finding the evidence sufficient to uphold the liability verdict.

other similar referrals by her) to Ross, much less that CAN gave its approval.

The majority concludes that the jury could find Landa was CAN's agent with respect to her referral of Tonkin because Landa was a contact person, CAN functioned through contact persons who referred people to deprogrammers including Ross, Ross conducted involuntary deprogrammings, and CAN was aware that Ross conducted involuntary deprogramming. That reasoning, however, requires a leap of logic. It might be supportable if Tonkin had called CAN and been referred to Landa who then referred her to Ross. However, that did not occur. On this record, Landa's connection with CAN was irrelevant to her dealings with Tonkin and Ross.

A hypothetical might help make the point. Suppose X is a delivery driver for the ABC bread company and also for the DEF bread company. He drives the identical route for each but alternates serving the two companies, on one day he delivers for ABC and the next for DEF. On a day on which he delivers for ABC, he hits a pedestrian. Surely DEF could not be held liable (along with ABC) although X is its agent and performs the identical service for DEF as for ABC. The same is true in this case: CAN cannot be held liable although Landa was its agent. There is no evidence that in referring Tonkin to Ross, Landa was acting as CAN's agent.

Accordingly, I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON SCOTT, Plaintiff-Appellee, v. RICK ROSS, aka RICKEY ALLEN ROSS; MARK WORKMAN; CHARLES SIMPSON, Defendants, and CULT AWARENESS NETWORK, a California Non-Profit Corp., Defendant-Appellant	No. 96-35050 D.C. No. CV-94-00079-JCC ORDER

Filed August 26, 1998

Before: Mary M. Schroeder and Robert R. Beezer, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Order; Concurrence by Judge Schroeder; Dissent by Judge Kozinski

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ORDER

The majority of the panel has voted to deny the petition for rehearing. Judge Schwarzer votes to grant the petition. Judge Schroeder votes to reject the suggestion for rehearing en banc and Judge Beezer so recommends.

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*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

Pursuant to rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellee's motion to vacate this courts October 27, 1997 Order staying execution of judgment is granted.

SCHROEDER, J., concurring:

I agree fully with Judge Beezer's opinion and write separately only to emphasize a key fact in this case. In Judge Schwarzer's dissent, his bread-delivery hypothetical suggests that Landa might have made the referral to Ross on behalf of an anti-cult organization other than CAN. There was, however, no evidence that Landa ever made referrals on behalf of other organizations. Rather, the evidence was sufficient to enable the jury to find that Landa was acting on behalf of CAN and no other organization when she referred Tonkin to Ross.

KOZINSKI, Circuit Judge, with whom **PREGERSON, REINHARDT, KLEINFELD, HAWKINS, TASHIMA** and **McKEOWN**, Circuit Judges, join, dissenting from the order rejecting the suggestion for rehearing en banc:

This is the case that put the Cult Awareness Network out of business and silenced its message. It is a bitter object les-

son in the dangers of ignoring the Supreme Court's pronouncement in *NAACP v Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Plaintiff's mother, Kathy Tonkin, sought help in extricating three of her sons from the Life Tabernacle Church. Her eldest son Jason Scott, an adult, was brought into involuntary contact with Rick Ross through the following chain of events: (1) Tonkin contacted (2) the Seattle Community Service hotline, which referred her to (3) Parent Awareness, a local anti-cult organization. Parent Awareness was staffed by (4) Shirley Landa, who holds herself out as an expert in deprogramming children involved in cults. Landa then referred Tonkin to (5) Rick Ross. Tokin hired Ross, and Ross illegally abducted the plaintiff, held him captive and unsuccessfully tried to convince him to leave the church. Ross, CAN and others were held liable for conspiracy to violate Scott's civil rights; CAN was socked for $87,500 in compensatory and $1 million in punitive damages.

CAN is nowhere to be found in the chain of referrals, yet the panel majority upholds the million dollar award. CAN, a nonprofit organization with just four paid employees, maintained a list of contacts throughout the country who volunteered to speak out against cult membership and mind control. Landa was one of CAN's volunteer contacts. CAN didn't know about or authorize the referral to Ross. Nor did it know about, authorize, condone or ratify Scott's deprogramming. Tonkin never sought CAN's assistance to help deprogram her sons. CAN had no control over the referral or what happened afterwards.

The panel majority nevertheless upholds the award on the theory that Landa was acting as CAN's agent. This is a dubious premise to begin with: Landa wasn't paid by CAN, and she worked with many other anti-cult organizations, all of which could be held jointly liable under the panel's logic.

See Scott v. Ross, 140 F.3d 1275, 1287 (9th Cir. 1998) (Schwarzer, J., dissenting). More importantly, the panel ignores the threat that vicarious tort liability poses to the freedom of CAN's members to associate with one another. In direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association.

Claiborne Hardware involved a sometimes-violent black community boycott of white-owned businesses in Mississippi. The boycotters were held liable under Mississippi law for the loss of business and goodwill caused by the boycott. Claiborne Hardware secured a judgment in state court holding the NAACP vicariously liable for the acts of Charles Evers, a Field Secretary for the NAACP and an organizer of the boycott. In determining whether Evers' relationship with the NAACP justified the imposition of derivative liability, the Supreme Court considered whether "Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence," *Claiborne Hardware*, 458 U.S. at 930; whether the NAACP ratified or had specific knowledge of any violence, *see id.* at 930-31; and whether the NAACP supplied financial assistance to the boycott, *see id.* at 931. Finding that the NAACP had in no way authorized or ratified the violence, the Court held that "[t]o impose liability . . . would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.*[1]

Shirley Landa's relationship with Can was far less direct than Charles Evers' link to the NAACP. Evers was a paid Field Secretary for the NAACP; Landa was an unpaid

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[1] The Court made it plain that this holding was wholly independent of its separate holding that Evers' leadership and organization of the boycott, even when combined with his emotionally charged rhetoric, did not justify imposing liability on him for violent acts that occurred weeks or months after one of his speeches.

volunteer for CAN and many other organizations. Evers helped found the local branch of the NAACP and was widely known as an NAACP representative; Tokin was referred to Landa by the Seattle Community Service hotline and had never heard of CAN when she requested Landa's help. In *Claiborne Hardware*, the Court exonerated the NAACP even though "the NAACP . . . posted bond and provided legal representation for arrested boycott violators." *Id.* at 931 n.78. In this case, CAN never ratified Landa's referral in any way. By any measure, this is an *a fortiori* case to *Claiborne Hardware*.

The majority distinguishes *Claiborne Hardware* in a single sentence: "In *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa." *Scott*, 140 F.3d at 1283. And what is this link? The panel explains that "CAN members routinely referred callers to deprogrammers, including involuntary deprogrammers." *Id.* But involuntary deprogramming is not illegal; involuntary deprogramming of minors with the consent of their parents is perfectly legal. Thus, it would have been entirely appropriate for CAN to refer the distraught parents of a minor to someone who will subject the child to involuntary (though nonviolent) deprogramming.[2] Nothing in the opinion – nothing in the record – provides any support for the view that CAN approved or authorized *illegal* deprogramming. Indeed, CAN had an official policy *against* illegal deprogrammings. The majority dismisses this policy as inconsistent with CAN's actual practices, but it is simply mistaken: CAN supported involuntary deprogramming of minors, but not involuntary deprogramming of adults. The opinion cites no contrary evidence because there is none.

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[2] Indeed, the opinion recognizes that involuntary deprogramming is not always illegal when it notes that a CAN employee saw a television program that reported that "Ross restrained a fourteen-year old boy and conducted an involuntary, although not illegal, deprogramming." *Id.* at 1282.

There is a big difference between advocating an activity when it is lawful and advocating the same activity when it is unlawful. Fallacious reasoning that conflates the two is especially dangerous in the First Amendment context. Take the proverbial parade down Main Street: Many organizations encourage their members to stage such events in order to bring their message to the public. Does this mean that they advocate holding demonstrations during rush hour without a permit? Under the majority's theory, the organization could be held liable for injuries caused by an illegal demonstration held by one of its affiliates, even though the parent never authorized or advocated an illegal demonstration. All lawful conduct can be conducted in an illegal fashion; ignoring this crucial distinction does away with the protection afforded organizations under *Claiborne Hardware*.

Just as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), protects freedom of speech by narrowly circumscribing the reach of state libel law, *Claiborne Hardware* limits derivative liability to protect freedom of association. As the Supreme Court has noted: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284-86) (citing, inter alia, *Claiborne Hardware*, 458 U.S. at 933-34). The evidence cited by the majority here clearly does not provide the support required by the First Amendment.

The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. As the Court explained in *Claiborne Hardware*: "To equate the liability of the national organization with that of the Branch

in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit." *Claiborne Hardware*, 458 U.S. at 931-32 (quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from dismissal of writ of certiorari)) (internal quotation marks omitted).

Is "destruction of lawsuit" a judicial fantasy, a chimera? Indeed not. This is the very case that put CAN out of business. *See In re Cult Awareness Network, Inc.*, 205 B.R. 575, 576 & n.1 (Bankr. N.D. Ill. 1997) (noting that this case "precipitated CAN's voluntary petition for relief" in bankruptcy court); Susan Hansen, *Did Scientology Strike Back?*, The American Lawyer, June 1997, at 62, 67 (describing how CAN was forced to cease operations when it couldn't afford the bond for a stay pending this appeal). CAN effectively died as a direct result of this judgment, and the mission its supporters set out to accomplish died with it.[3] This result is troubling regardless of where one falls on the political spectrum. Should ACT UP be litigated out of existence if one of its protestors punches a photographer? Should Planned Parenthood be shut down because a pro-choice doctor performs an abortion on a minor without obtaining parental consent where required by state law? Should the NRA be put out of business because one of its field representatives provided a firearm to a minor, contrary to the organization's policy? *Claiborne Hardware* already answers these questions in the negative, for much the same

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[3] Strictly speaking, there is an organization that operates under the Cult Awareness Network logo, having bought the logo and 800 number of the original CAN in a bankruptcy court sale of assets. *See* http://www.cultawarenessnetwork.org. It is an organization with a very different message than the original CAN. Some may believe this is a better message. But the message of the original CAN, and those who supported it, has been silenced.

reasons that the New York Times can't be held liable if an advertisement ruffles some feathers,[4] a delegate can't be convicted for attending a meeting of the Communist Labor Party,[5] a KKK leader can't be arrested for organizing a protest[6] and Nazis can goose-step in Skokie.[7] We have taken a great leap backwards in the protection of First Amendment freedoms. I dissent.

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[4] *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

[5] *See Whitney v. California*, 274 U.S. 357 (1927).

[6] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[7] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON SCOTT,	)	
	)	
Plaintiff,	)	CASE NO. C94-79C
	)	
v.	)	JUDGMENT ON
	)	DECISION BY THE
RICK ROSS, et al.,	)	COURT
	)	
Defendants.	)	
	)	

This action came on for trial before the Court and a jury, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a verdict having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiff is awarded compensatory damages in the sum of $875,000. Punitive damages are awarded against defendant Rick Ross in the sum of $2,500,000, defendants Mark Workman and Charles Simpson in the sum of $250,000 each and against defendant Cult Awareness Network in the sum of $1,000,000.

DATED this 3rd day of October, 1995.

John C. Coughenour
United States District Judge

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON SCOTT,	)	
	)	
Plaintiff,	)	CASE NO. C94-0079C
	)	
v.	)	ORDER
	)	
RICK ROSS, et al.,	)	
	)	
Defendants.	)	
	)	

This matter comes before the Court on the following motions: (1) defendant Cult Awareness Network's (hereinafter "CAN") motion for judgment as a matter of law, a new trial, or a new trial conditioned on a remittitur; (2) CAN's and defendant Rick Ross' motions to stay execution of judgment; (3) defendant Rick Ross' motion for a new trial or amendment of judgment; and (4) plaintiff Jason Scott's motion for an award of attorney's fees.

I. PROCEDURAL BACKGROUND

In January 1994, Mr. Scott filed this action requesting a jury trial on a variety of claims against CAN, Mr. Ross, Mr. Mark Workman, Mr. Charles Simpson and Mr. Clark Rotroff.[1] Each of the claims stemmed from the abduction and involuntary religious deprogramming of Mr. Scott. Prior to trial, the Court narrowed the claims to conspiracy to violate Mr. Scott's civil rights under 42 U.S.C. § 1985(3) (hereinafter "§ 1985(3)"), the tort of outrage, and negligence.

[1] Prior to trial, plaintiff entered into a settlement agreement with Mr. Rotroff for an undisclosed sum.

At the close of trial, the jury returned a verdict against each of the defendants on virtually all the remaining claims.[2] The jury awarded compensatory damages in the amount of $875,000.00. Pursuant to the civil rights claim, the jury awarded punitive damages in the amount of $1,000,000.00 against CAN, $2,500,000.00 against Mr. Ross, and $250,000.00 each against Mr. Simpson and Mr. Workman.

Mr. Ross and CAN now challenge the jury's findings and move the court for an order staying execution of the judgment.

II. STANDARD OF REVIEW: JUDGMENT AS A MATTER OF LAW AND NEW TRIAL

On a motion for judgment under Fed. R. Civ. P. 50, the court must determine "whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, reasonably can support *only* a verdict for the moving party." Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (emphasis in original). If substantial evidence supports a verdict for the non-moving party, judgment as a matter of law is inappropriate. Id. "Substantial evidence" requires a showing of "such evidence as a reasonable mind might accept as adequate to support a conclusion." Los Angeles Land Co. v. Brunswick Corp., 6 F.3rd 1422, 1425 (9th Cir. 1993).

Under Fed. R. Civ. P. 59, a new trial may be granted "if the verdict is contrary to the clear weight of the evidence, or ... to prevent, in the sound discretion of the trial judge, a miscarriage of justice." Murphy v. Long Beach, 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). In making this

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[2] In the only exception, the jury found that CAN's actions did not constitute the tort of outrage.

determination, the Court may simply weigh the evidence and need not view it from the perspective most favorable to the non-moving party. Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 190 (9th Cir. 1989).

III. CAN'S TRIAL MOTIONS

CAN asserts that the evidence produced at trial does not support the jury's findings that CAN acted negligently or conspired against Mr. Scott under § 1985(3). CAN also challenges the award of punitive damages and the amount assessed against it. The Court shall consider each claim separately.

A. NEGLIGENCE

CAN claims the evidence on negligence did not support a finding that Ms. Shirley Landa acted as CAN's agent with respect to the events in question. See Nordstrom Credit, Inc. v. Department of Revenue, 120 Wash.2d 935, 940, 845 P.2d 1331 (1993) (agency must be established with respect to the particular transaction out of which the injury arises). CAN asserts that the most the evidence shows is that Ms. Landa generally acted as a contact person and volunteer for CAN on other occasions.

The Court concludes that the evidence supports the jury's finding on the negligence claim against CAN. CAN's attempt to distance itself from Ms. Landa's actions and Mr. Scott's deprogramming through the use of phrases such as "contact person" and "volunteer" belies the great weight of the evidence. For example, there was an abundant showing that Ms. Landa was an active member of CAN, the contact person for CAN in Washington during the time of the events in question, and under CAN's control and supervision during

this time.[3] Further, evidence also showed that Ms. Landa acted in accordance with CAN practices by distributing information on cults and referring Mr. Scott's mother, Ms. Kathy Tonkin, to Mr. Ross for deprogramming. This combination of factors, along with the rest of the evidence contained in the record, makes judgment as a matter of law or a new trial on the negligence claim unwarranted.

B. CONSPIRACY TO VIOLATE CIVIL RIGHTS

CAN asserts that the evidence at trial was also insufficient to support a finding that CAN took part in A conspiracy to deprive Mr. Scott of his civil rights under § 1985(3). As a basis for this argument, CAN reasserts that the evidence does not support a finding that Ms. Landa acted as CAN's agent. CAN also claims that the record does not show that Ms. Landa, or anyone else at CAN, knowingly participated in the plan to abduct Mr. Scott, deprogram him, and deprive him of the right to interstate travel.

Again, the Court concludes that the evidence sufficiently supports the jury's determination that CAN knowingly participate in the decision to abduct Mr. Scott and deprive him of the right to interstate travel. Moreover, the evidence conclusively established that the decision was motivated by a discriminatory animus towards his religious affiliation.[4] For example, the evidence showed that Ms. Landa referred Ms. Tonkin to Mr. Ross, met with the deprogramming "team" during their initial trip to Washington, and met with her sister and Ms. Tonkin to

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[3] The Court notes that the main support for the CAN's argument that Ms. Landa was acting for another organization comes from Ms. Landa herself. Given the numerous illustrations of Ms. Landa' bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony.

[4] The Court has already rejected CAN's contention regarding Ms. Landa's agency status.

discuss any legal recourse for removing Mr. Scott from his church.[5] There was also substantial testimony that the conspiracy included a clear goal to hold Mr. Scott against his will, prevent him from pursuing a mission outside the country, and transport him to across state lines to a retreat for ex-members of religious groups.

Accordingly, judgment as a matter of law or a new trial on the civil rights claim against CAN would be inappropriate.

C. PUNITIVE DAMAGES

On the award of punitive damages, CAN asserts that: (1) it cannot be held liable for punitive damages stemming from Ms. Landa's conduct; (2) the record does not support a finding of the type of motive necessary for punitive damages; and (3) the amount of the award was unreasonable. CAN also argues that the award was prompted out of the passion of an inflamed jury.

In order to sustain a finding of punitive damages against a principal for the acts of its agent, it must be found that the agent acted in a managerial capacity or that the principal authorized or ratified the acts of the agent. Mitchell v. Keith, 752 F.2d 385, 389-91 (9th Cir. 1985). This authorization or ratification must be made with knowledge that the agent acted out of ill-will, spite, for the purpose of injuring, or with complete indifference to the plaintiff's safety and rights. Id., Jury Instruction No. 29.

If punitive damages were appropriately assessed, the amount must still comport with standards of due process. In determining whether an award violates due process, the

[5] The Court also notes that further evidence in the record linked CAN to the conspiracy in a number of ways unrelated to Ms. Landa's actions alone.

Ninth Circuit has endorsed a three stage process. Morgan v., Woessner, 997 F.2d 1244, 1256 (9th Cir. 1993). First, the Court must determine whether the jury was adequately instructed. Id. Second, the Court must review the award for excessiveness. Id. The third stage is appellate review. Id.

CAN does not object to the adequacy of the jury instructions on punitive damages. Rather, CAN asserts that the award is excessive. In reviewing for excess, the Court must look to factors bearing on reasonableness. Id. at 1257. These reasonableness factors include, but are not limited to: (1) whether there is a reasonable relationship between the harm caused and the award; (2) the degree of reprehensibility of the conduct as well as the conduct's duration and frequency; (3) the profitability to the defendant; (4) the financial position of the defendant; (5) all costs of litigation; (6) the imposition of criminal sanctions against the defendant; and (7) the existence of other civil awards versus the defendant for the conduct. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045 (1991).

The court finds that there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN. Again, by way of example, CAN admitted to its control and supervision of its contact persons. CAN officials stated that these persons could be removed for violation of policy. However, Ms. Landa was not removed for violation of policy and remains a CAN contact person.

As noted above, testimony also established that Ms. Landa, acting in accordance with CAN's practices, disseminated inflammatory information on cults and referred Ms. Tonkin to a known "involuntary deprogrammer." As the evidence demonstrated, it was within the knowledge of CAN and Ms. Landa that these practices would lead to Mr. Scott's abduction in this case. Thus, the Court finds that the evidence also supports the jury's determination that CAN's

ratification of Ms. Landa's acts was done with knowledge of their malicious nature as well as the deliberate disregard to Mr. Scott's rights.

Finally, the court concludes that the amount of punitive damages awarded against CAN was reasonable, within the boundaries of due process, and not improperly prompted by passion. CAN's argument against the award relies most heavily on the fact that it is a non-profit corporation and was forced into bankruptcy by this judgment. However, these financial factors are not necessarily determinative and are heavily outweighed by other factors in this case.

Initially, the Court notes that the reprehensibility of CAN's conduct goes far to justify the amount of the award. The continued use of euphemisms such as "involuntarily deprogramming" does not alleviate the fact that the actions in furtherance of the conspiracy involved the forceful abduction and retention of an adult against his will. Nor do the references to the goal of "educating" the public answer the virtually undisputed evidence that materials on "cults" will be negative and highly inflammatory by definition. the evidence showed that without regard to this fact, and despite an admitted lack of personal knowledge of Mr. Scott's church or his ability as an adult to rationally choose his own religion, Ms. Landa sent these "cult" materials to Ms. Tonkin.

Other factors tend to show the reasonableness of the award as well. For instance, the evidence illustrated that the defendants' actions caused Mr. Scott to suffer physically. More importantly, the evidence firmly supports a finding that the entire deprogramming episode shook his emotional stability and rendered his family life non-existent. Finally, it is undisputed that CAN does not face criminal charges or further civil liability for its actions. Thus, having carefully considered these and the rest of the relevant factors, the

Court concludes that the amount of the punitive damages assessed against CAN was reasonable and appropriately supported by the evidence.

IV. MR. ROSS' MOTION FOR A NEW TRIAL

Mr. Ross claims that a new trial is warranted due to error in the jury instructions, failure to exclude Mr. Scott's counselor's testimony, and lack of evidence supporting damages. If the court is unwilling to grant a new trial on the merits, Mr. Ross argues that a new trial should be held on the damages issue alone. Again, the Court shall discuss the specific issues separately.

A. JURY INSTRUCTIONS

Mr. Ross claims that a new trial is warranted due to error in the Court's instructions to the jury. He asserts that the instructions should have included language that the § 1985(3) claim required an element of "invidiously discriminatory class-based animus." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971). He also claims that the instructions improperly allowed the jury to consider whether the defendants' actions violated Mr. Scott's First Amendment right of freedom of religion. United Brotherhood of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357 (1983).

Mr. Ross' reliance on the language in Breckenridge is misplaced. Although class-based discriminatory animus is undoubtedly required, the Supreme Court has not given the term "invidiously discriminatory class-based animus" the type of talismanic effect suggested by Mr. Ross. In the present case, the Court finds that Jury Instruction 21 contained the proper § 1985(3) discriminatory standard based upon Mr. Scott's religious affiliation. Specifically, the instruction stated that "there must be some intentional purpose to discriminate against plaintiff's religion as the

basis for the conspirator's action. The conspiracy, in other words, must have been aimed at depriving plaintiff because of his religion, members of plaintiff's religion, or other similar religions equal enjoyment of the rights secured by law to all persons." Jury Instruction 21; Cf. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (stating that the classes protected under § 1985 include those who have been singled out by the Court's as "suspect" or "quasi-suspect").

Similarly, the Court finds that Mr. Ross' objection that the instructions improperly allowed the jury to consider Mr. Scott's freedom of religion does not justify a new trial. As stated above, Jury Instruction 21 identified the type of discriminatory animus required under the law. Indeed, such instruction was necessary to ensure that the jury did not consider whether the conspiracy was aimed at Mr. Scott personally or simply at depriving him of the right to interstate travel. This instruction was immediately followed with instructions stating Mr. Scott's assertion on the right to interstate travel, clearly designating this assertion as an element of the conspiracy claim, and stating that Mr. Scott needed to prove all elements of the § 1985(3) claim by a preponderance of the evidence.[6]

The court also concludes that the decision to instruct the jury on the claims of negligence against the individuals does not warrant a new trial. The need for instructions on the individual negligence claims was clear to the parties prior to trial. The Court had previously held that the complaint sufficiently stated a claim of negligence against the individual defendants. As such, the Court finds that instructing the jury and allowing Mr. Scott's counsel to

[6] With regard to the amount of proof on these elements, the court again notes that there was ample evidence supporting the finding that Mr. Ross acted with the purpose to deprive Mr. Scott of the right to interstate travel due to discriminatory feelings towards his religious affiliation.

submit supplemental instructions did not unfairly surprise or prejudice any of the defendants. In this regard, it is worth noting that Mr. Ross did not object to the content of the negligence instructions on individuals.

B. EXCLUSION OF WITNESSES

The Court finds that the decision to allow the testimony of Mr. Scott's counselor does not warrant a new trial. The Court determined that Mr. Ross was sufficiently aware of the intent to call a counselor and received adequate discovery in this regard. Moreover, the testimony only added additional support to the evidence concerning the amount of damages Mr. Scott incurred. Given the amount of evidence produced against Mr. Ross on the substantive claims and the amount of damages, a new trial would be inappropriate.

C. COMPENSATORY AND PUNITIVE DAMAGES

Mr. Ross objects to the amount of both the compensatory and punitive damages awarded. Mr. Ross claims that the evidence was insufficient to support the amount of compensatory damages, the amount of punitive damages was unreasonable, and the jury's award was motivated out of passion.

Considering the extensive testimony on the destruction of Mr. Scott's family life as well as his physical and emotional problems after the deprogramming, the Court finds that evidence does not justify a new trial or a reduction of compensatory damages. Again, numerous witnesses verified the extent of these injuries. However, the parties agree that the compensatory damages should be offset by the amount of the settlement with Mr. Rotroff. See Husky Refining Co. v. Barnes, 119 F.2d 715, 716 (9th Cir. 1941); RCW 4.22 et seq. Accordingly, the Court orders Mr. Scott's counsel to submit documentation of this settlement amount.

As to punitive damages, Mr. Ross also argues that the award was excessive. Specifically, Mr. Ross asserts that the damages bear no relation to the harm suffered or to the amount necessary to deter his future conduct. The Court disagrees.

The Court concludes not only that there is a sufficient relationship between the harm and Mr. Ross' conduct, but that the remaining reasonableness factors also weigh heavily towards upholding the jury's punitive damages award. As noted above, the evidence supported the large award of compensatory damages. Moreover, Mr. Ross' use of terminology cannot avoid the uncontradicted evidence that he actively participated in the plan to abduct Mr. Scott, restrain him with handcuffs and duct tape, and hold him involuntarily while demeaning his religious beliefs.[7]

A large award of punitive damages is also necessary under the recidivism and mitigation aspects of the factors cited in Haslip. Specifically, the Court notes that Mr. Ross himself testified that he had acted similarly in the past and would continue to conduct "deprogrammings" in the future. Further, Mr. Ross faces no future criminal or civil liability for his conduct.

Finally, the Court notes each of the defendants' seeming incapability of appreciating the maliciousness of their conduct towards Mr. Scott. Rather, throughout the entire course of this litigation they have attempted to portray themselves as victims of Mr. Scott's counsel's alleged agenda. Thus, the large award given by the jury against both CAN and Mr. Ross seems reasonably necessary to enforce the jury's determination on the oppressiveness of the

[7] With regard to Mr. Ross' role in this affair, the Court notes that there is no credible support for the contention that he was merely another participant in a plan wholly developed and controlled by Ms. Tonkin.

defendants' actions and deter similar conduct in the future. Accordingly, the Court finds that both the compensatory and punitive damages awards were reasonable and well founded in the evidence.

V. MOTION TO STAY JUDGMENT

Both CAN and Mr. Ross moved the Court for an order staying the exercise of the judgment in this matter until after the decision on the Rule 50 and Rule 59 motions. These motions are moot.

VI. MOTION FOR ATTORNEY'S FEES

Mr. Scott requests attorney's fees in the amount of $225,915.00. This request is made pursuant to 42 U.S.C. § 1988 which provides that a Court may award attorney's fees to a prevailing party in a § 1985 claim. 42 U.S.C. § 1988(b).

In response to the request for fees, defendants CAN and Mr. Ross notified the Court that they have declared bankruptcy since the entry of judgment. As such, they correctly contend that any decision on the award of attorney's fees against them is automatically stayed under bankruptcy law. 11 U.S.C. § 362(a). In order to ensure the ability to make adequate factual findings on the fees and prevent potential prejudice arising from any award against defendants Mr. Workman and Mr. Simpson, this Court shall stay consideration of the attorney's fees issue until the discontinuation of or relief from the automatic stay in CAN's and Mr. Ross' bankruptcy proceedings.

VII. CONCLUSION

In summation, the Court hereby ORDERS as follows:

1) CAN's Motion for a Judgment as a Matter of Law or a New Trial is DENIED;

2) Mr. Ross' Motion for a New Trial or for Reduction in Damages in DENIED in part, and GRANTED in part. Attorneys for Mr. Scott are ORDERED to submit verification of the amount of the settlement with Mr. Clark Rotroff. The award of compensatory damages shall be offset in the amount of this settlement;

3) CAN's and Mr. Ross' Motion for Stay of Judgment is MOOT;

4) Mr. Scott's Motion for Attorney's Fees is STAYED from consideration in this Court pending the discontinuation of or relief from the automatic stay in the CAN and Rick Ross bankruptcy proceedings.

SO ORDERED this 29 day of November, 1995.

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The Honorable John C. Coughenour
United States District Judge

UNITED STATES CONSTITUTION
FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. 1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.